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Coloniality and case law on the Australian asylum offshoring scheme

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Abstract: This article presents an analysis of case law from Nauru, Australia and Papua New Guinea concerning the Australian offshoring scheme for asylum seekers. Its specific focus is to enquire to what extent and how colonial conceptual and ideological patterns of thought play a role in the reasoning of the courts involved. The analysis shows the Australian averseness to have its external action in former colonies subjected to international (human rights) law; and the juggling of sovereignty so that it justifies the administration of policies in former colonies. However, it also shows resistance to this coloniality, be it from actors with relatively little power. These insist on application of well-developed international human rights norms to Australian administration of its policies in two former colonies, and to some extent incorporate international power relations into their sovereignty reasoning. Other courts in the Global South have engaged more fundamentally with core assumptions of international migration law.

Keywords: asylum; Papua New Guinea; Nauru; Australia; externalisation of migration policy; colonialism; comparative law.

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1 Introduction

This article presents an analysis of case law from three jurisdictions (Nauru, Australia and Papua New Guinea) concerning the same issue (the Australian offshoring scheme for asylum seekers). This implies a comparison of the judgments of the courts involved, as well an analysis of their interaction. Comparative legal analysis is often geared towards law-making (Viennet et al., 2022); it shares this characteristic with refugee law scholarship (Byrne and Gammeltoft-Hansen, 2020). While policy-oriented research is obviously legitimate and worthwhile, the purpose of this article will be instead to get a better understanding of coloniality in international migration law. The term coloniality is taken from Quijano (2007). While political colonialism as a historical phenomenon has come to an end, the conceptual and ideological matrix that was developed for its legitimation remains at work as an unspoken element of modernity, justifying continued

domination by Europe and its descendants in Anglophone settler societies [Tlostanova and Mignolo, (2012), pp.31–59]. Concretely, my analysis will seek to enquire to what extent and how colonial conceptual and ideological patterns of thought [i.e., coloniality, or in Anghie's (2005) words the ongoing colonial structure of international law] play a role in the reasoning of the courts involved.

For this, comparative law is not an innocent method. At its core is the classification of national legal systems into groups. Traditionally, this categorisation is Eurocentric. A central post-war figure of comparative law, David and Jauffret-Spinosi (1992, pp.15–24), distinguished as main 'families of law' the Roman-German, common law, and socialist families, with a residual category of 'other systems' consisting of Muslim, Hindu and Jewish law, the law of the Far East, and the law of Africa and Madagascar. The leading work of Zweigert and Kötz (1996, pp.62–73) distinguished six categories, being Roman law, German law, Anglo-American law, Scandinavian law, the law of the Far East, and religious law (namely Islamic and Hindu law), with a residual category to be addressed in legal anthropology instead of comparative law, namely 'Völker mit noch unzureichender zivilatorischer Ausrüstung' (peoples with as yet insufficient civilisation equipment, ibid, 10). Although some unease about this has begun to reach the mainstream of comparative law (e.g., Husa, 2015), attention for historical power differences between different countries and legal systems is still absent in mainstream comparative law studies.

Attention for such power differences is warranted when one addresses the interaction between different legal systems in the context of externalised migration policies. In our context, it warrants attention that Australia administered Papua New Guinea and Nauru between 1917 and their independence in 1968 (Nauru) and 1975 (Papua New Guinea). In addition, Nauru counts 21 km^2, Papua New Guinea 463.000 km^2, and Australia 7.6 million km^2. In 2020 they had a population of 11,000, 9 million and 25.6 million, with a per capita GDP in 2020 of $11.000, $2.600 and $52.000 respectively (World Bank). The inequality developed under colonialism has not ended with political independence, but continues.

This article focuses on the constitutional cases in the three countries concerned. As we will see, these cases engage in conversation. Analysing them as related will allow for an analysis of the colonial structure of Australian case law, as well as resistance against it by the Papua New Guinea Supreme Court. The Australian tort law cases on the issue (Holy, 2020) will not be addressed, as they do not interact directly with courts in Papua New Guinea and Nauru. I will read case law in two ways. In part 3, I analyse it as any other lawyer would, in order to identify the logic of its reasoning: how is the issue phrased, which arguments are presented, how is the outcome justified? In addition however, in part 4, I read judgments (including separate opinions) as texts that can be subjected to a content analysis, with attention for ambiguities, inconsistencies, and neurotic repetitions like any other text. This may imply taking a step back from the legal-technical content and focus on seeming trivialities. As Dembour (2015, p.22) has put it, this means to "approach every decision as a piece of anthropological mini-field work: a conversation between different voices (some of them submerged), framed in a fairly formal way, producing many expected results, but at the same time developing with unanticipated twists."

The distinctness of this approach consists of including materials from the Global South, combined with sensitivity to the ongoing relevance of colonial relations; and attention not just for the legal take-away of judgments but also for the ways in which

their conclusions are presented as logical and obvious. As a consequence of the policy orientation of comparative and refugee law scholarship, it tends to propose amendments to existing law. This reproduces the fundamental assumptions of the field and takes these to be legitimate. However, there are reasons not to take the legitimacy of these fundamental assumptions for granted. In particular, international migration law legitimises global inequality of mobility along lines of race, class and gender (Achiume, 2019; Spijkerboer, 2018). The analysis developed below will show that Australian courts are averse to the application of international law, and strategically ignore as well as sanctify Nauruan/Papua New Guinean sovereignty. On both points, the Papua New Guinea Supreme Court has engaged in tactical resistance (not calling in question the fundamental assumptions of international migration law as developed in the global North), while other courts in the Global South have engaged in more fundamental moves against the legal doctrine exemplified in this article by Australian case law.

2 The offshore scheme

The Australian offshoring scheme for asylum seekers consists of two elements [Ghezelbash, (2018), pp.111–127; Gleeson, 2019]. First, Australian law provides that persons arriving by boat without authorisation cannot submit an asylum application in Australia. Second, such persons are transferred to Papua New Guinea and Nauru, with which Australia has concluded agreements in which these countries accept these transfers, while Australia bears all costs. The modalities of the scheme have changed over time. The material in this article is limited to the second phase of the offshoring scheme, beginning in 2012, and describes this only to the extent that this is necessary for understanding this case law. Initially, resettlement of persons recognised as refugees was possible subject to the 'no advantage' principle, meaning they would not be resettled sooner than if had they waited for their claims to be processed elsewhere. Later, resettlement in Australia was excluded altogether.

Like the first phase of the offshoring scheme, the second phase led to litigation. The interaction between courts in Nauru, Papua New Guinea and Australia makes this a suitable set of cases for analysing the colonial structure of legal reasoning of the courts involved.

3 The cases

In the following, we will look at the case law from Nauru, Papua New Guinea and Australia concerning the second phase of Australia's offshoring scheme, beginning in 2012. This will be done in chronological order, beginning with the Nauru's Supreme Court 2013 judgment on the constitutionality of the detention of asylum seekers. The Court found the detention in conformity with the Constitution of Nauru, because the transfer and detention of people to Nauru always had as a purpose to remove people from Nauru, a purpose that was required by the Constitution. Subsequently, the High Court of Australia decided in 2014 that the detention to which transferees were submitted on Papua New Guinea did not follow from Australian law, and therefore was not unconstitutional. Also, the Court held that it was not required that the transfers were in conformity with international law or the law of the country of destination. In a follow-up

judgment concerning Nauru from 2016, the High Court ruled that Australia's involvement in the detention of asylum seekers in Nauru was lawful. However, also in 2016, the Supreme Court of Justice of Papua New Guinea held that the detention of offshored asylum seekers was unconstitutional because it had no legal basis. In 2017, the High Court of Australia held that this had no consequences for the legality of the offshoring scheme under Australian law, because that does not require conformity with international law or the domestic law of another country. This paragraph will look at the legal take-away of these judgments. A coloniality reading will be developed in paragraph 4.

3.1 AG & Ors

In June 2013, the Nauru Supreme Court, sitting as a single judge, ruled on the lawfulness of the detention of asylum seekers in the Regional Processing Centre on Nauru (*AG & Ors v State Secretary of Justice*). The applicants arrived in Christmas Island, Australia, on 1 September 2012, and were transferred to Nauru on 24 September 2012. Nauru had issued permits allowing lawful entry into Nauru, called Australian Regional Processing visas, for the purpose of making a refugee status determination. A condition linked to these visa was that its holders reside in specified premises. The processing centre was run by a firm contracted by the Australian Government. Humanitarian support was provided by the Salvation Army (*AG & Ors*, 27), while the International Organisation for Migration assisted persons who wanted to return to their country of origin (ibid, 19).

The Supreme Court first addressed the question whether the requirement that the visa holders reside in specified premises constituted detention. The Court referred to its two previous judgments (*Amiri v Director of Police* and *Mahdi v Director of Police*) on situations that were "very similar to these in the present case" (*AG & Ors*, 43), and where the Court held that the conditions amounted to detention. In the current case, the Supreme Court followed that assessment, and remarked this was in conformity with the human rights case law to which parties had referred (namely that of the European Court of Human Rights and the UK House of Lords, while the two previous judgments had referred to the Australian Federal Court and the US Supreme Court). The restraints to which the applicants were subjected were imposed by Nauru, the applicants had not voluntarily accepted them, and the restraints were not due to the applicants choosing not to exercise the option of returning to their country of nationality (ibid, 45–48). After assessing the concrete conditions in the Processing Centre (ibid, 52–54), the Court concluded that these constituted detention.

The Court then turned to the constitutionality of the detention. The Nauru Constitution allows for detention of a person "for the purpose of preventing (…) unlawful entry to Nauru, or for the purpose of effecting (…) expulsion, extradition or other lawful removal from Nauru" [*Constitution of Nauru*, Article 5(1)(h)]. As the applicants had entered Nauru, the issue was whether the detention was "for the purpose of effecting (… their) lawful removal from Nauru" (*AG & Ors*, 61–62). The Court again relied on its two previous rulings, where it was found that "it was always the intention that the asylum seekers (…) would only have temporary residence in Nauru, and after their refugee claims were determined none would remain in Nauru. For this reason their detention was for the purpose of determining their lawful removal from Nauru, either to a country willing to accept them or to the country of their nationality", despite the fact that their

claim to refugee status had not yet been examined (ibid, 62). The Court justified its different approach compared to that of the European Court of Human Rights by pointing out that whereas Article 5(1)(f) ECHR allows for detention of a person against whom 'action is being taken' with a view to deportation (hence requiring an event, namely the taking of action), the Nauru Constitution allows for detention 'for the purpose of' removal (hence requiring a purpose, namely the removal). This purpose can exist before an examination of the asylum application has been undertaken and before a removal order has been made (ibid, 64–69). But even under the stricter terms of the ECHR, detention would have been justified, according to the Court. The visa had been granted with a view to refugee status determination; it had never been the intention of Nauru that their stay would be other than temporary. In the pertinent Memorandum of Understanding with Australia, it was stipulated that Australia agreed to make all efforts to ensure that transferees would depart from Nauru in as short a time as possible, and that Australia would take responsibility for resettlement of those found to be refugees and removal of the others. The Court concluded that in terms of the test of the ECHR, the applicants were the object of removal, a decision that they would be removed had been taken, and there was a present intention that the applicants were to be removed – even if it was clear that this could take a long time (ibid, 72–76). Because of this purpose and prospect of removal, Article 5(1)(h) of the Constitution allowed for the detention.

The Court deferred ruling on the argument of the applicants that the detention was arbitrary because processing their asylum claims and resettling or removing them would take a long and unreasonable delay. The point where such an excessive delay would occur had not yet been reached (ibid, 79).

The Court's reasoning is straightforward and technical. At its core is the remarkable consideration that the detention of a person whose asylum application is yet to be examined (and under circumstances indicating that this may take quite a while) is brought under detention for the purpose of removal, on the basis of the argument that the transfer *to Nauru* as such is implemented with a view to removal *from Nauru*. It is equally remarkable that the authority to issue a visa is considered to encompass the power to order detention as a condition for issuing a visa. This is an extensive interpretation of the requirement that detention has an explicit basis in law, because detention is construed as an incident of the authority to issue visas. Throughout its reasoning, the Court stresses how well aligned, in its opinion, its decision is with international human rights jurisprudence, while simultaneously insisting on the independent value of the Constitution of Nauru.

The Court's emphasis on the temporary character of the applicants' stay in Nauru does not sit easily with its assessment of the 2012 Memorandum of Understanding between Nauru and Australia. The Court quotes Article 11 of the MoU: "The Commonwealth of Australia will make all efforts to ensure that all persons entering Nauru under this MOU will depart within as short a time as is reasonably necessary for the implementation of this MOU (…)." The Court then continues: "Whether Nauru appreciated at the time that the concluding words in clause 11 of the MOU can be construed to mean that the timing of the removal of a transferee from Nauru would be subject to Australia's 'no advantage' policy is not disclosed by the evidence. Perhaps it did not (…)", as is suggested by the preamble of the Nauruan legislation implementing the MoU which the Court quotes, stating that "The terms of the arrangement are that the Commonwealth of Australia will take responsibility for the resettlement or removal of each person *on completion of the processing*" (underlining in the original, TS; ibid, 15).

This attention for the possibility that Australia and Nauru had different expectations about the length of the asylum seekers' stay in Nauru has no clear relevance for the Court's reasoning.

3.2 Plaintiff S156/2013 and Plaintiff M68/2015

In *Plaintiff S156/2013 v Minister for Immigration and Border Protection & Anor*, the High Court of Australia ruled on the constitutionality of the Australian legislation at the basis of the offshoring scheme, as well as on the designation of Papua New Guinea as a regional processing country. In *Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors*, the Court ruled on the arrangements through which asylum seekers were detained on Nauru. Together, these judgments allowed for the continuation of the offshoring scheme. In *Plaintiff S156/2013*, the High Court found the provisions in the Australian Migration Act, on which transfers to Papua New Guinea were based, to be constitutional. It did this in a unanimous and brief judgment. Essential to its finding was that it separated the detention to which transferees were to be subjected in Papua New Guinea from the relevant provisions of Australian law. This separation allowed the Court to accept that the Australian Constitution does not allow for legislation permitting extraterritorial detention. According to the High Court, the relevant articles do not "make any provision for imprisonment in third countries" (*Plaintiff S156/2013*, 37). Furthermore, while the Court agreed that the implementation of transfers to Papua New Guinea could be incompatible with international law (ibid, 10, 44), it held without substantive argumentation that it is not required by the Migration Act that this circumstance is taken into account (ibid, 40, 44). The only requirement is that the Minister thinks that designating a country is in the national interest (ibid, 11, 40).

A follow-up case concerned Australia's responsibility for the detention to which asylum seekers were subjected upon in Nauru (*Plaintiff M68/2015*, 28). Despite the fact that the detention centre in Nauru was funded by Australia with major involvement of Australian officials in its day-to-day affairs (ibid, per French, Kiefel and Nettle, 3, 10, 12–13, 28, 39, 41, 46; per Bell, 66, 69, 77, 78, 83–93; per Gageler, 107, 171–173; per Keane, 204–209, 239, 261; per Gordon 269, 287, 292, 294, 296–298, 300, 302–306, 315, 317–318, 321–337), four judges found that the detention was to be regarded "as the independent exercise of sovereign legislative and executive power by Nauru" (ibid, per French, Kiefel and Nettle, 34; per Keane, 199, 239), although they admitted that Australian officers participated in the detention of asylum seekers on Nauru (ibid, per French, Kiefel and Nettle, 37, 39, 41; per Keane, 204–209, 239, 261). The other three judges found that Australia "funded the RPC (regional processing centre, TS) and exercised effective control over the detention of the transferees through the contractual obligations it imposed on Transfield (…) her detention in Nauru was, as a matter of substance, caused and effectively controlled by the Commonwealth parties" (ibid, per Bell, 93; comp. per Gageler, 173; per Gordon, 276, 353). Whatever the qualification of Australia's involvement in the detention on Nauru, six judges found such involvement lawful because it was reasonably necessary to the statutory "purpose of determining claims by UMAs (unauthorised maritime arrivals, TS) to refugee status under the Refugees Convention" (ibid, per French, Kiefel and Nettle, 46; per Bell, 99–101; per Gageler, 185; per Keane, 264). Conformity with Nauruan constitutional law was held not to be required (ibid, per French, Kiefel and Nettle, 52; per Gageler 181; per Keane, 249,

258; per Gordon, 414). In a dissenting opinion, Gordon held that the detention of asylum seekers on Nauru by Australia was not reasonably necessary for removal from Australia, and therefore exceeded the exceptional constitutional and statutory bases for detention (ibid, 389–393). "Put simply, the aliens power does not provide the power to detain *after* removal is completed" (ibid, 393, per Gordon; italics in original, TS).

3.3 Namah v Pato

In 2014, the Papua New Guinea Constitution was amended so as to allow for the detention of foreign nationals "under arrangements made by PNG with another country." In a case before the Papua New Guinea Supreme Court of Justice, the leader of the opposition brought a case against the Papua New Guinea Government, seeking declaratory orders to the effect that the transfer and detention of asylum seekers on Manus Island were unconstitutional, and that the 2014 amendment was unconstitutional and invalid [*Belden Norman Namah v Rimbink Pato, the National Executive Council and the Independent State of Papua New Guinea*; on the context of this case see Dastyari and O'Sullivan (2016), Tan (2018) and Tan and Gammeltoft-Hansen (2020, pp.350–353)]. The Supreme Court ruled unanimously for the applicant.

Like many other fundamental rights instruments, the Papua New Guinea Constitution as it read before the 2014 amendment allowed for the detention of people for the purpose of preventing their unlawful entry, for effecting their removal, or for procedures related to these purposes [*Constitution of the Independent State of Papua New Guinea*, Art. 42(1)(g)]. The transferees had no desire to enter Papua New Guinea, were brought there by force, and had been granted permission to reside in Papua New Guinea for the purpose of the Australian offshore scheme. The Constitution does not allow for the detention of people who do not try or wish to enter Papua New Guinea, and whose presence on Papua New Guinea territory is not irregular. Therefore, the detention on Manus Island was unconstitutional under the unamended text of the Constitution.

As a result, the central question was whether the constitutional amendment was constitutional. Article 38 of the Papua New Guinea Constitution provides that any law (and this includes a law amending the Constitution) restricting the exercise of a right or freedom is reasonably justifiable in a democratic society; that such a law explicitly expresses to be such a law; and specifies the right or freedom it regulates or restricts. Whether such a law is reasonably justifiable is to be determined in accordance with the Papua New Guinea Constitution, as well as a number of international human rights documents and institutions, domestic and foreign precedent, declarations by the International Commission of Jurists and other similar organisations, and any other relevant material (*Constitution of the Independent State of Papua New Guinea*, Art. 39). Therefore, the obligation of the legislature to ensure that restrictions of fundamental rights and freedoms are 'necessary and justified' was a matter for the Court to adjudicate. The Court found the amendment to be unconstitutional. It was more or less hidden in a broader amendment, did not specify the rights or freedoms it restricted and also failed to argue that the restriction was reasonably justifiable (*Namah v Pato*, 53–54). Without explicitly ruling on this, the Supreme Court signalled that the required justification cannot be given for persons who are in the country lawfully, and in this context referred to the UNHCR Guidelines on Detention (ibid, 65–66). In addition, the Court pointed out that even if the amendment were lawful, implementing legislation would be needed to provide for a legal basis of detention, which had not been adopted. It ordered "both the

Australian and the Papua New Guinea Governments" to take all steps necessary to cease and prevent the detention (*Namah v Pato*, 74).

The Supreme Court judgment resulted in an end to the detention of asylum seekers in Papua New Guinea. Whether it resulted in a substantial improvement of the condition of the detained asylum seekers is questionable (Tan, 2018; Tan and Gammeltoft-Hansen, 2020).

3.4 Plaintiff S195/2016

In a brief and unanimous judgment, the High Court of Australia considered the consequences of *Namah v Pato* for the legality of Australian acts under Australian law (comp. Maguire, 2017). It held that there were none. There was, the High Court ruled, "no room for doubt that neither the legislative or the executive power of (Australia) is constitutionally limited by any need to conform to international law" or "to the domestic law of another country" (ibid, 20). It also held that the agreements between Australia and Papua New Guinea were not null as a consequence of having been found unconstitutional (ibid, 21), partly because *Namah v Pato* did not hold that the conclusion of these agreements contravened the Papua New Guinea Constitution (ibid, 25). Citing *Plaintiff M68/2015*, it held that "the lawfulness or unlawfulness of Executive Government action under Australian law or under the law of a foreign country (…) does not determine whether or not that action falls within the scope of the statutory capacity or authority conferred by (Australian law)" (ibid, 27). Although the Court cited *Namah v Pato's* injunction against both the Australian and the Papua New Guinea Government (ibid, 24), it did not ponder the question what the legal status of this injunction was.

4 Analysis

These cases contain two elements that can be clarified by focusing on coloniality or, in Anghie's terminology, on the colonial structure of their legal reasoning. They are the way in which courts relate to international law; and how they see state sovereignty.

4.1 Pertinence of international human rights law

As we have seen, both the Nauru and the Papua New Guinea Supreme Courts insist that their interpretation of human rights law is consistent with international human rights law. They referred to the ECHR and Strasbourg case law when they discussed whether the restrictions to which asylum seekers are subjected amount to detention (*AG & Ors*, 39–40, 44, 50; *Namah v Pato*, 30), and in their considerations as to whether the detention was legitimate (*AG & Ors*, 63–67, 73). The Papua New Guinea Supreme Court gave a broad statement to this effect:

> "Although all human beings are born with all of their rights and freedoms, some suppressive regimes and or governments deny the people of their rights or freedoms over the years, until they got restored as nations evolved from their stone ages to more modern democracies. Some of the rights and freedoms came through a lot of sacrifices made by many people, such as Martin Luther King in the United States in the past and many more. Hence, the imperative is there to protect the rights and freedoms of persons under the various international law

> conventions and protocols and many domestic laws, such as the PNG Constitution." (*Namah v Pato*, 52)

The High Court of Australia, to the contrary, dismisses appeals to international law as irrelevant. The most explicit statement is in *Plaintiff S156/2013* (at 44):

> "There may be some doubt whether the provisions (…) can be said to respond to Australia's obligations under the Refugees Convention. Indeed, that is part of the plaintiff's complaint. This possibility does not assist the plaintiff's argument. Rather, it would follow that the conditions for which the plaintiff contends cannot be implied on the basis of any assumptions respecting the fulfilment by Australia of its international obligations."

Similarly, in *Plaintiff S195/2015*, the High Court considered that there is "no room for doubt that neither the legislative nor the executive power of the Commonwealth is constitutionally limited by any need to conform to international law" (at 20). Although it is evident that in a dualist jurisdiction such as Australia, international law cannot be directly invoked before domestic courts, international law can play a role in the interpretation of domestic law. This can be done in particular by interpreting statutory law in such a manner that it is compatible with international law obligations (see for example *Ruhani v Director of Police [No. 2]*, per Kirby, 67). In particular, such a construction would have been plausible in *Plaintiff S156/2013*. Australian statutory law provides that a country can be designated as a regional processing country if the Minister thinks it is in the national interest to do so. In considering the national interest, the Minister must have regard to assurances given by that country that it will not expel or return persons to another country where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion [this is a direct quote from Article 33(1) of the Refugee Convention]; and whether the designated country will assess whether persons taken to that country are refugees in the sense of the 1951 Refugee Convention as amended by the 1967 Protocol (*Plaintiff S156/2013*, 11). Even if this were not to be considered as an implementation of the Refugee Convention allowing the Convention to be invoked before Australian courts, it is remarkable that the High Court does not address the question whether the designation of a regional processing country should be implemented in such a manner as to avoid the consequence of Australia not meeting its international obligations – the possibility of which was admitted by the Minister of Immigration and Border Protection in that case (ibid, 10). This argument actually has been made on behalf of the applicants (ibid, 39), but the Court's only response is the passage quoted above. The Court simply does not respond to the argument in substance.

Averseness on the side of colonial powers to the application of international human rights law in colonies is a constant (Hussain, 2003; Reynolds, 2017). Article 56 ECHR (the so-called colonial clause) allows European state parties to not extend the Convention to their colonies or, if they choose to do so, to apply it there "with due regard to local requirements." Fawcett (1969, p.342) specified in 1969 that the concept of "local requirements refers primarily to permanent or organic characteristics of a territory and would not extend to temporary features." A current textbook admits that the local requirements standard "may permit a lower standard of compliance with the Conventions' requirements in dependent territories" [Harris et al., (2014), p.101]. Even with the colonial clause, the UK accepted the competence of the European Court of Human Rights in individual cases only after decolonisation, in 1966, while France

acceded to the Convention only in 1974 (Duranti, 2017; Simpson, 2001). The migration case law of the European Court of Human Rights and the EU Court of Justice concerning the migration 'crises' can be understood as importing this colonial exception to Europe in cases concerning former colonial subjects seeking to enter the metropole without prior authorisation (Spijkerboer, 2022).

The short shrift the High Court gives to international law (in particular to interpretation of domestic law in conformity with international law) is hard to understand as a matter of legal technique. I propose that the convoluted last sentence of the quote above (on conditions that cannot be implied on the basis of assumptions – this is really unclear) puts something into words which, apparently, the Court found obvious. Although the text of the provision at stake requires that the Minister takes into account whether the designation as a regional processing country is compatible with international legal obligations (*Plaintiff S156/2013*, 11), and although the Minister has admitted that it is possible that this is not the case (ibid, 10), it seems obvious to the High Court that this is immaterial. If one interprets the High Court's position as an instance of coloniality, its position becomes perfectly intelligible. The European reflex of preferably not applying human rights law in colonies, and if at all than in a sub-standard version, has survived political decolonisation. From this perspective, human rights law does not apply to external actions in former colonies, nor to people originating therefrom unless the former colonial power consents with their presence on the territory.

4.2 Ambiguous sovereignty

All agree that the transfers and the concomitant detention occurred at the behest of Australia. Australia initiated the offshoring scheme, bore all costs, and was directly involved in its day-to-day management, in part directly, and in part by its contracts with the firms running the detention centres [*AG & Ors*, 27; *Plaintiff S156/2013*, 5, although it continues to state that "(t)he extent to which Australia participates in the continued detention of the plaintiff is not evident", ibid, 6; *Plaintiff M68/2015*, per French, Kiefel and Nettle, 3, 10, 12–13, 28, 39, 41, 46; per Bell, 66, 69, 77, 78, 83–93; per Gageler, 107, 171–173; per Keane, 204–209, 239, 261; per Gordon 269, 287, 292, 294, 296–298, 300, 302–306, 315, 317–318, 321–337; *Namah v Pato*, 20, 39]. A graphic illustration of this is that, upon arrival in Nauru, asylum seekers were handed "a two page document headed with the Australian coat of arms and Australian Government – Department Immigration and Citizenship" which, essentially, explained to asylum seekers that the refugee status determination procedure was still under development "by the Australian and Nauruan Governments" and that everything would take a lot of time. The document also explained the 'no advantage' principle (*AG & Ors*, 18).

On the other hand, all courts involved agree that detention is an act of the Governments of Papua New Guinea and Nauru. In addition, they emphasise the power of Papua New Guinea and Nauru to regulate the admission of non-nationals at will as an element of their sovereignty [the so-called plenary powers doctrine, developed at the end of the 19th century to justify the exclusion of Asian immigrants (Ghezelbash, 2017)]. The Nauru Supreme Court considers that, "(a)s a sovereign State Nauru can determine who it will allow to enter its territory, and can in its absolute discretion refuse entry to an alien" (*AG & Ors*, 6). It cites an Australian High Court judgment given on appeal against a Nauru Supreme Court judgment (about which more *infra*), which stated: "As a sovereign

State, it is for the Republic of Nauru to annex whatever conditions it pleases to permission given to an alien to enter it. This is so whether the entry be voluntary or, as the appellant says was the case here, it be involuntary" (ibid, 70; the quote is from *Ruhani v Director of Police [No. 2]*). Likewise, the High Court of Australia emphasises time and again the sovereign independence of Nauru in *Plaintiff M68/2015* (at 34, 196, 239, 252, 255, 259; and in Gordon's dissent, 356, 414). In none of these contexts are the words sovereign or independent necessary for the legal argument; they could have been left out without loss of meaning.

Equal emphasis on the independent sovereignty of the former colony is given in the context of the discussion whether Australian law requires that the detention be in conformity with the domestic law of Nauru or Papua New Guinea. Keane J argues that Australian law indicates that constitutional validity of a Nauruan law is not required (ibid, 249), and then goes on to argue at length that "considerations of international comity and judicial restraint militate strongly against an Australian court ruling on the validity or invalidity of a law of Nauru as a matter of Nauru's domestic law" (ibid, 250), because this would amount to "impertinence and paternalism" (ibid, 252). On this point, Gordon's dissenting opinion agrees: "Australia is bound to respect the independence of another sovereign state, and the courts of one country will not, except in limited and presently irrelevant circumstances, sit in judgment on the acts of the government of another state done in the territory of that other state" (ibid, 414). When, after *Namah v Pato*, it turned out that the Supreme Court of an independent sovereign state actually did hold detention to be against its Constitution, the High Court did not mention Papua New Guinea's independent sovereignty but merely concluded that this was irrelevant for the lawfulness of Australia's actions (*Plaintiff S195/2016*).

The insistence on the inappropriateness of judging judgments of foreign courts is twofold. First: actually, the Australian High Court itself can be called on so as to rule on Nauruan domestic law. An Agreement between Australia and Nauru from 1976 provides that appeals from the Supreme Court of Nauru can be brought before the High Court of Australia except, as far as relevant in our context, when the appeal involves the interpretation or effect of the Constitution of Nauru (*Agreement between the Government of Australia and the Government of the Republic of Nauru relating to Appeals to the High Court of Australia from the Supreme Court of Nauru*, 1976). This Agreement was implemented in Australian Law (*Act Relating to Appeals to the High Court from the Supreme Court of Nauru*, 1976). One of the rare cases in which such an appeal was lodged concerned an asylum seeker who had been transferred to Nauru from the MV Tampa in 2001 [see on the Tampa affair see Ghezelbash (2018, pp.81–94)]. The Nauruan Supreme Court had held that the asylum seekers had not been unlawfully detained (*Amiri v Director of Police*; *Mahdi v Director of Police*). The High Court declared itself competent to hear an appeal against a similar judgment (*Ruhani v Director of Police*), and rejected the appeal (*Ruhani v Director of Police [No. 2]*). The High Court did emphasise that it is exceptional that it functions as a court of appeal "from the Supreme Court of another independent sovereign country" (*Ruhani v Director of Police*, 33, 39, 47, 153, 167, 273, 286, 288). Adding to the irony of the emphasis on how inappropriate it would be for an Australian court to rule on the acts of another state, is that the judgment of the Nauruan Supreme Court in *AG & Ors*, permitting Australia's offshoring scheme, was given by a single judge, John von Doussa – an Australian national who was appointed as a non-resident judge in the Nauruan Supreme Court after having been a judge in the Federal Court of Australia and President of the Australian Human Rights

Commission (Wikipedia). One of the judges in *Namah v Pato* also was a non-resident judge in the Papua New Guinea Supreme Court (judge Terence Higgins, equally a former Australian judge; Wikipedia), but he was one of five judges in a unanimous verdict.

A further twist to the issue of sovereignty is given by the Papua New Guinea Supreme Court, which ordered "(b)oth the Australian and the Papua New Guinea Governments" to end the detention on Manus Island (*Namah v Pato*, 74). In doing so, the Supreme Court ignored the international law doctrine of state immunity, which holds that, as a function of the sovereign equality of states, states cannot be sued in the courts of other states unless they have explicitly agreed to that [*Jurisdictional Immunities of the State*, 57; see on this element of *Namah v Pato* (Song, 2016)]. While the Court does not as much as mention the doctrine of state immunity, in substance it emphasises throughout the judgment that the Papua New Guinea Government is allowing Australia to implement its policies on Papua New Guinea territory. In the first substantive paragraph of its judgment, the Court states that Australia decided to relocate its asylum processing centres outside Australia, and that the Papua New Guinea Government "decided in favour of accommodating Australia's wish in exchange for certain monetary and other considerations." Asylum seekers were "forcefully brought into PNG (…) under Federal Police escort (…) All costs are paid by the Australian Government" (*Namah v Pato*, 20). The permission for transferees to be in PNG was given "(f)or the purpose of the arrangement between the two governments" (ibid, 21). They are forcefully transferred and detained "by the PNG and Australian Governments" as a result of "the joint efforts of the Australian and PNG Governments." When these arrangements turned out to be outside the legal and Constitutional framework of PNG, "(t)he governments of PNG and Australia therefore took steps to regularise the forceful transfer and detention of asylum seekers" (ibid, 39). Therefore, the Papua New Guinea Government "with the assistance of the Australian Government" is held to be responsible for the transfer and detention of the asylum seekers (ibid, 73), despite the doctrine of state immunity.

The courts struggle with the concept of sovereignty. Although the period in which Papua New Guinea and Nauru were administered by Australia ended in 1968 and 1975 respectively, it is evident for all that the offshoring scheme is being administered by Australia. In addition, in *AG & Ors*, Nauruan constitutional law was administered by an Australian judge. In *Namah v Pato*, the Papua New Guinea Supreme Court draws the conclusion that, where Australia is effectively exercising administrative power on Papua New Guinean territory, it is for that reason subject to its jurisdiction. This is an admission that Papua New Guinea's independent sovereignty is fragile, and factors this into the delineation of the Court's jurisdiction. In *Plaintiff S195/2016*, while the High Court of Australia does cite the PNG Supreme Court's injunction, it does not deign to respond. It does not even reject the injunction by mentioning the doctrine of state immunity, and in effect ignores the injunction. However when, in *Plaintiff S156/2013* and *Plaintiff M68/2015*, the High Court argues that Australia is not responsible for the consequences of its offshoring scheme, as well as when it is argued that conformity with the domestic law of Papua New Guinea and Nauru is immaterial, the independent sovereignty of the former colonies is emphasised, culminating in Keane J's extensive concern for paternalist and impertinent behaviour on the side of Australia (*Plaintiff M68/2015*, 252).

At a micro-level, we can observe here the functioning of sovereignty of formerly colonised states as analysed by Anghie (2005). Australia uses its political and financial power ('certain monetary and other considerations', *Namah v Pato*, 20) to implement

policies on foreign territory which are not in the interest of the states concerned. The Supreme Court of Nauru flags the weak position of the Nauruan Government explicitly where it points out that it seems to have been misguided in believing the presence of asylum seekers would be temporary (*AG & Ors*, 15); and implicitly where it constructs the transfer *to Nauru* as having as its aim removal *from Nauru* (ibid, 62, 73) which is irrational from a Nauruan policy point of view. At the same time Australia denies responsibility for the legal consequences of its policy (which, as Australia admits, may well violate international law). It does so by relying on the notion of sovereignty: the independent sovereign states of Papua New Guinea and Nauru have agreed, and therefore none of this is not paternalist or impertinent. The Papua New Guinea Supreme Court and Gordon's dissent in *Plaintiff M68/2016* sought to counter this in a move that can be assimilated to the first generation of Third World Approaches to International Law, which tried to transform the content of international law so as to take into account the needs and aspirations of the peoples of newly independent states [Anghie and Chimni, (2003), pp.79–82]. In this case, that means piercing the notion of sovereignty, so as to align legal responsibility with the extent of the actual sovereignty Papua New Guinea and Nauru had vis-à-vis Australia. In *Namah v Pato*, the Papua New Guinean Supreme Court asserted jurisdiction over Australia, while Gordon's dissent in *Plaintiff M68/2016* concluded that asylum seekers are being detained on Nauru by Australia (*Plaintiff M68/2016*, per Gordon at 276, 323, 352–356). As Gordon put it: "to focus on the exercise of the sovereign power by Nauru (…) is to distract attention from the fundamental point (…) which this Court is here asked to consider – the power of the Commonwealth Executive to detain an alien and thereby deprive her of her liberty" (ibid, 356). Although this conclusion is shared by two other judges, Gordon is the only one to draw the conclusion that human rights guarantees of Australian law apply to this Australian detention (ibid, 391).

5 Conclusions

The analysis above brings to light that the case law on the Australian asylum offshoring scheme is an example of two forms of legal coloniality: the averseness of powerful states to have their external action in former colonies subjected to international (human rights) law; and the juggling of sovereignty so that it justifies the administration of policies in former colonies. However, it also shows resistance to this.

What *Namah v Pato* and Gordon's dissent in *Plaintiff M68/2015* share is the application of well-developed international human rights norms to Australian administration of its policies in two former colonies. In one case this is done by subjecting Australia to Papua New Guinean jurisdiction, in the other by subjecting Australian acts on Nauruan territory to Australian law. The fact that in one case Australia's sovereignty is 'pierced', while in the other a judge proposes to pierce Nauru's sovereignty by applying Australian law to Australian acts on Nauruan territory illustrates the small-scale, tactical (as opposed to strategic) nature of these moves. These tactical manoeuvres are made by actors with little power (a Supreme Court whose injunction is simply ignored by the Australian High Court and a judge taking a 1–6 minority position).

They are worthy of attention nonetheless, because they show that the coloniality of international migration law can be, and actually is being, contested even at the micro level.

Some more powerful legal actors engage strategically with fundamental assumptions of international migration law. The Inter-American Court of Human Rights has ruled that equality and non-discrimination are peremptory norms of international law (aka *ius cogens*). It lists migration status (i.e., having or not having a residence right) as a prohibited discrimination ground. This does not mean that states cannot make any distinction between nationals and non-nationals, or between documented and undocumented migrants. But such distinctions require justification and have to be reasonable, objective, proportionate, not discriminatory and not harmful to human rights (*Advisory Opinion OC-18/03*, 119, 169; comp. Dembour, 2015). In addition, the Inter-American Court uses the notions of cross-border harm and positive obligations so as to counter the 'sovereignty games' (Adler-Nissen and Gammeltoft-Hansen, 2008; Aalbers and Gammeltoft-Hansen, 2018) in which states of the global North engage so as to justify their interventions in the Global South (*Advisory Opinion OC-23/17*; *Advisory Opinion OC-25/18*; De Leo and Ruiz Ramos, 2020). Similarly, the African Commission on Human and Peoples' Rights has held that expulsion of foreigners may violate the right to property, the right to work, the right to education, the right to family life, the right to equality, the right to an effective remedy, as well as the prohibitions of mass expulsion and of refoulement. Only after addressing these issues, it acknowledges that states can take legal action against undocumented migrants (*Union Inter-Africaine des Droits de l'Homme and others v Angola*; *RADDHO v Zambia*). Likewise, authors from the Global South engage in fundamental critiques of foundational tenets of international migration law (e.g., Chimni, 1998, 2009, 2019; Hamadou, 2018).

This case law from the Global South develops a different position on international migration law than the one adopted in the case law of the Australian High Court, the European Court of Human Rights as well as other courts in the global North. Yet so far their positions are not considered as sources of international law, but merely of regional or local relevance (Spijkerboer, 2021). Comparative law scholarship will gain in relevance if it takes sources from the Global South seriously as sources of international migration law. Some of these sources contest the colonial structure of international migration law at a tactical micro-level (as in *Namah v Pato*), while others, including the Inter-American Court of Human Rights and the African Commission for Human and Peoples' Rights, go much further by not basing their case law on the plenary powers doctrine (*supra*, para. 4.2) that underlies the case law of courts in Europe and its anglophone settler colonies. Such an approach can help in addressing the current bias to the benefit of global North perspectives in the field.

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